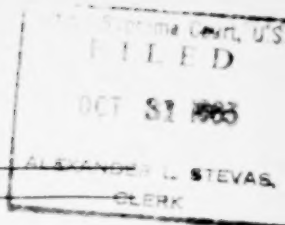


No. 83-234



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1982 TERM

EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

REPLY TO
PETITION FOR WRIT OF CERTIORARI ON APPEAL
FROM THE SUPREME COURT OF NORTH DAKOTA

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REPORTS OF OPINIONS DELIVERED

IN THE COURTS BELOW

The opinion of the Supreme Court
of North Dakota is reported as

State v. Ennis, 334 N.W.2d 827 (N.D. 1983)

IN THE
SUPREME COURT OF THE UNITED STATES
No. 83-234
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EDWARD ENNIS,

Petitioner,

vs.

STATE OF NORTH DAKOTA,

Respondent.

STATEMENT OF CASE

The petitioner Edward Ennis was charged on April 8, 1982 with one count of unlawful possession of marijuana with intent to deliver, and four counts of unlawful delivery of hashish or marijuana, in violation of North Dakota Century Code provisions. Petitioner was convicted of all five charges at a bench trial before the Honorable Bert L. Wilson.

At trial there was only one witness who testified as to what the substances were in each case, and that was the state's expert witness, Aaron Rash, the supervisor of the North Dakota Crime Laboratory. (Transcript 216 and 240)¹. He positively identified the substances as marijuana and hashish (Transcript 240) and stated he relied on four laboratory tests to identify the samples; (1) Microscopic examination; (2) Duquenois-Levine; (3) Thin-layer chromatography; and (4) Infrared spectroanalysis. (Transcript 223).

The defense presented an expert witness, Dr. Dwight Fullerton who has testified as an expert witness in about twenty states and had collaborated with defense counsel, Marc Kurzman, on several articles. (Transcript 329 - 331). Dr. Fullerton, in his testimony, tried to discredit some of the analysis which

¹ Transcript 216 indicates transcript at page 216.

Aaron Rash had performed. (Transcript 323 - 361 and 367 - 396 and 413 - 414). Dr. Fullerton specifically stated he had not run any tests on the marijuana. (Transcript 388). In addition he testified that he could not state that the substance was not hash or marijuana. (Transcript 394). Hence, only the state's expert, Aaron Rash testified as to what the substances were. He testified that the substances were marijuana and hashish. (Transcript 240).

Judge Wilson found the defendant guilty of all five charges. Judge Wilson stated:

"He's also guilty beyond a reasonable doubt, there is a doubt, but not beyond a reasonable doubt." (Transcript 439).

Defense counsel did not make any objection or comment to the language the Court used. (Transcript 439 - 440).

Petitioner's motion for a new trial was denied and he was sentenced to imprisonment for seven years with four years suspended and fined five thousand dollars. The sentences were to run concurrently.

On appeal, the petitioner asserted, inter alia that the evidence introduced by the state was insufficient to identify the substances as marijuana or hashish and

"With regard to the identification, of substances sold and or seized as "marijuana", the trial judge's doubts were reasonable and mandated an acquittal."

[See Appendix page A-1] (Table of Contents, Brief of Appellant on Appeal to the Supreme Court of North Dakota in State v. Ennis Criminal numbers 885, 895, 896, 897, & 898.)

The Supreme Court of North Dakota reversed Petitioner's conviction on the possession with intent to deliver a controlled substance and affirmed the four delivery charges. State v. Ennis, 334 N.W.2d 827, 836 (N.D. 1983) the Supreme Court of North Dakota stated.

(10) We are reluctant to reverse the factual findings of a trial court with regard to disputed questions of fact. State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978). We will not substitute our judgment for that of the trial court if the trial judge's factual determinations are supported by substantial evidence. Olmstead, supra, 246 N.W.2d at 890; State v. Champagne, 198 N.W.2d 218, 226 (N.D. 1972); State v. Larson, 61 N.W.2d 274, 275 (N.D. 1953).

Where the trial court heard the experts testify, observed their demeanor, and judged their

credibility, and where there is substantial competent evidence to support the court's factual determination, we conclude that the defendant failed to leave us "... with a definite and firm conviction that a mistake has been committed." Olmstead, supra, 246 N.W.2d at 890. That is the situation in this case as to the existence of the controlled substance.

State v. Ennis, 334 N.W.2d at 833.

Petitioner asked for a rehearing on the basis that the Court "unfairly shifted the burden of proof to the defendant." (Page 5 of Petition for Rehearing). The Petition was denied and Petitioner is now before this Court requestings a writ of Certiorari.

ARGUMENT

1. THE NORTH DAKOTA SUPREME COURT REVIEWED THE RECORD AND FOUND SUBSTANTIAL EVIDENCE TO SUPPORT THE IDENTIFICATION OF THE SUBSTANCES AND DID NOT SHIFT ANY BURDEN OF PROOF TO THE PETITIONER.

The petitioner substantially misstates the facts upon which the North Dakota Supreme Court placed reliance. There can be no doubt that the burden of proof rests upon the state and may not be shifted, even in the slightest, to the defendant. Wilbur v. Mullaney, 496 F.2d 1303, 1307 (1st Cir. 1974), Affirmed 421 U.S. 684 (1975). It is so axiomatic and fundamental that it is inconceivable that the North Dakota Supreme Court would place such a burden on the defendant and it is clear that the North Dakota Supreme Court did not do that in this case.

The reviewing Court's function with respect to factual findings is to ensure that the findings are supported by substantial evidence and where they are the Court will not substitute its judgment for that of the Trial Court.

State v. Olmstead, 246 N.W.2d 888, 890 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S.Ct. 2264, 56 L.Ed.2d 759 (1978).

In this case the North Dakota Supreme Court identified the substantial evidence it was relying on as follows:

"The state's expert witness, Aaron Rash, Supervisor of the Crime Laboratory Division of the State Laboratories Department, testified that he performed four laboratory tests upon the samples in question: microscopic identification; Duquenois-Levine; thin layer chromatography; and infrared spectroanalysis. According to Rash, each of these tests indicated that the substance were marijuana or hashish."

Ennis, supra, 334 N.W.2d at 833. The Court then stated that the defense presented evidence in an "attempt to undermine Rash's testimony". Id. at 833. The Court recognizing the fact that only one expert testified as to what the substance was, stated that the defense expert "admitted that he was not stating nor could he state that the substances analyzed were not marijuana or hashish." Id. at 833. The North Dakota Supreme Court obviously was pointing out that there was no evidence directly conflicting with the state's expert's opinion that the substances were marijuana and hashish. Hence, there was no shifting of the burden to the defendant. The defense may introduce substantial amounts of evidence asserting that

the basis for Rash's opinion may not allow positive identification of the substances through their expert witness, but the Reviewing Court does not substitute its judgment for that of the Trial Court when the record reveals substantial evidence in support of the verdict.

In this case the North Dakota Supreme Court detailed the evidence it determined to be substantial, that being that the state's expert, Aaron Rash, Supervisor of the Crime Laboratory performed four laboratory tests on the substances and that each test indicated to him that the substances were in fact marijuana or hashish. Id. at 833. The

North Dakota Supreme Court underscored this substantial evidence with the fact that only one of the experts testified as to what the substances were and that the

other did not and hence there was not only substantial evidence to support the factual element of identity of a controlled substance but the only evidence at trial indicated that the substances were marijuana or hashish.

The North Dakota Supreme Court reviewed the record and determined that there was substantial evidence, underscoring that determination as to the identification of the substances by stating that only one expert and not the other stated an opinion as to the actual identification of substances and did not shift any burden of proof to the petitioner.

As there was no shifting of the burden of proof and the presumption of innocence was not impinged there

was no denial of his due process rights under the Fourteenth Amendment to the United States Constitution.

II. THE TRIAL COURT APPLIED THE CORRECT STANDARD OF "PROOF BEYOND A REASONABLE DOUBT" OF GUILT.

This is the first time the petitioner has raised the issue as stated in his brief as follows:

BY REQUIRING THAT THE EVIDENCE RAISE MORE THAN A REASONABLE DOUBT OF PETITIONER'S INNOCENCE, THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED PETITIONER'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (Petitioner's Brief page 22.)

In his brief on appeal to the Supreme Court of North Dakota petitioner stated the following issue:

- B. With regard to the identification of substances

sold and or seized as
"marijuana", the trial
judge's doubts were
reasonable and mandated
an acquittal."

[See Appendix page A-1] (Table of Contents,
Brief of Appellant on Appeal to the Supreme
Court of North Dakota in State v. Ennis
Criminal numbers 885, 895, 896, 897, &
898.)

In his argument before the North
Dakota Supreme Court the petitioner
argued that the testimony and evidence
concerning identification of the substances
did raise reasonable doubts in the Trial
Court's mind. Petitioner's argument
clearly centered around sufficiency
of the evidence to raise doubt in the
Trial Court's mind and did not encompass
what he now wishes to assert for the first
time before this Court, that the Trial

Court was requiring that the defense raise more than a reasonable doubt. (Appendix at A-1, Table of Contents from Petitioner's Brief on appeal to the Supreme Court of North Dakota.)

In this case the Supreme Court of North Dakota, the State Court of last resort in North Dakota, did not have an opportunity to decide either a federal question or an important question of federal law. In which case there is no jurisdiction of this Court over the question petitioner would now wish to assert for the first time. (Rules of the Supreme Court, Rule 17 1 (a) & (b).)

Generally, where the Supreme Court of a state does not consider that a question involving violation of the

Constitution of the United States was raised in a case; and passes no opinion on it, the Supreme Court of the United States will not pass on it. Bartemeyer v. State of Iowa, 85 U.S. 129 (1873).

This rule appears flexible for consideration of exceptional cases. Youakim v. Miller, 425 U.S. 231, 234 (1976). The question presented by petitioner does not appear to be exceptional as there is no conflicting application of constitutional law, merely a factual interpretation of a judge's comments when he rendered a verdict. Pursuant to petitioners failure to assert this question before the Supreme Court of North Dakota the respondent would assert that it should not now be heard before this Court.

Should the Court wish to address this question, however, the respondent shall address it on its merits. In asserting this question the petitioner leaves out the Trial Court's most applicable comment. When petitioner asserted the question of whether or not the Court's doubt was reasonable he also failed to state the Court's entire response, and states only part of the Court's response, which is misleading. The Supreme Court of North Dakota used the entire response in the following footnote:

5. Ennis asserts that the trial court had a reasonable doubt regarding identification of the substances in question which doubt mandates a reversal. However, we must remind counsel of the exact language utilized by the trial court: "He's also guilty

beyond a reasonable doubt. And my only doubt is in the chemical analysis; that bothered me some, but it's not beyond a reasonable doubt...."

Upon analyzing this statement, we believe the testimony of defendant's expert Dr. Fullerton, created some question in the trial court's mind; however, such conflicting evidence did not create a "reasonable doubt".

Ennis, supra, at 833.

It is clear that Judge Wilson applied the proper standard, guilt beyond a reasonable doubt. Furthermore the Supreme Court of North Dakota could not have erred as alleged in petitioner's brief at page 26 as it did not have the opportunity to address the issue petitioner now raises.

CONCLUSION

For the reasons set forth above, respondent respectfully asks that this Court deny the petition for a writ of certiorari and enter an order to that affect.

Respectfully submitted,

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